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85-2064

(8)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES GREER, Warden, Menard Correctional Center, Petitioner,

vs.

UNITES OF AMERICA ex rel. CHARLES "CHUCK" MILLER, Respondent.

RESPONSE TO PETITION FOR CERTIORARI

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REASONS FOR DENYING THE WRIT

THE FEDERAL CIRCUITS UNIVERSAL APPLICATION OF THE CHAPMAN V. CALIFORNIA HARMLESS ERROR STANDARD TO VIOLATIONS OF DOYLE V. OHIO IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

The State has urged this Court to grant certiorari for the purpose of exempting violations of Doyle v. Ohio, 426 U.S. 610 (1976) from the constitutional harmless error standard mandated by Chapman v. California, 386 U.S. 18 (1967). Because the State's position is inconsistent with the prior decision of this Court and is without support in any of the federal circuits, the writ should be denied.

In Chapman, this Court held that "constitutional errors" must be shown to be harmless beyond a reasonable doubt. 386 U.S. at 23. Thereafter, in Doyle v. Ohio, this Court held that prosecutorial comment upon a defendant's post-arrest silence violates the due process clause of the fourteenth amendment. 426 U.S. at 619. Accordingly, the federal courts of appeal universally apply the Chapman harmless error standard to Doyle violations. See, e.g., United States v. Elkins, 774 F.2d 530, 539 (1st Cir. 1985); Hawkins v. LeFevre, 758 F.2d 866, 877 (2d Cir. 1985); United States v. Cummiskey, 728 F.2d 200, 204 (3d Cir. 1984), cert. denied, 105 S.Ct. 1869 (1985); Williams v. Zahradnick, 632 F.2d 353, 360 (4th Cir. 1980); Chapman v. United States, 547 F.2d 1240, 1248 (5th Cir.), cert. denied, 431 U.S. 908 (1977); Martin v. Foltz, 773 F.2d 711, 715 (6th Cir. 1985); United States v. Shoe, 766 F.2d 1122, 1133 (7th Cir. 1985); United States v. Disbrow, 768 F.2d 976, 980 (8th Cir. 1985); United States v. Ortiz, 776 F.2d 864, 865 (9th Cir. 1985); United States v. Remigio, 767 F.2d 730, 735 (10th Cir. 1985); United States v. Ruz-Salazar 764 F.2d 1433, 1437 (11th Cir. 1985).

Nevertheless, the State has argued that "Doyle" is a prophylactic measure not specified in the "Bill of Rights" and thus "violations of Doyle are not entitled to the harmless beyond a reasonable standard [sic] of review." State's Petition at p. 8. However, the Chapman mandate encompasses "constitutional error" and is not limited to violations of rights specifically enumerated in the Bill of Rights. Chapman v. California, 386 U.S. at 24. Moreover, although the State refers to Doyle as a "prophylactic measure" which is "at least three times removed from the Constitution" (State's Petition at p. 7), the constitutional importance of Doyle was recently reiterated by this Court in Wainwright v. Greenfield, 474 U.S. ___, 88 L.Ed.2d 623 (1986).

In Greenfield, this Court held that Doyle is violated when a prosecutor uses post-Miranda warnings silence as evidence of sanity. In re-affirming the constitutional underpinnings of the Doyle decision, this Court stated:

> In Doyle, we held that Miranda warnings contained an implied promise, rooted in the Constitution that "silence will carry no penalty."
>
> 88 L.Ed.2d at 632.
>
> * * *
>
> Doyle and subsequent cases have ... made clear that breaching the implied assurance of the Miranda decision is an affront to the fundamental fairness that the Due Process Clause requires.
>
> 88 L.Ed.2d at 630.

Thus, it is clear that Doyle is not merely a rule designed to increase adherence to Miranda. Instead, as this Court emphasized in Greenfield, comment upon a defendant's post-Miranda warnings silence is fundamentally unfair and constitutes a direct, wholly independent violation of the due process clause of the fourteenth amendment.

As a variant of its position, the State argues that the "harmless beyond a reasonable doubt standard" should not be enforced in habeas corpus proceedings. Referring to Judge Easterbrook's dissent, the State reasons that constitutional rules should be enforced less strictly on habeas corpus review. However, Judge Easterbrook's views were rejected by the other eight members of the en banc panel is this case and are also without support in any of the other federal circuits.

Moreover, in Wainwright v. Greenfield, Justice Rhenquest implied that the Chapman standard applies to habeas review of Doyle violations. Noting that the harmless error issue had been

waived on habeas corpus review in Greenfield, Justice Rhenquest stated:

> [T]he State does not argue here that any error was harmless beyond a reasonable doubt.
>
> 88 L.Ed.2d at 633. Rhenquest, J. concurring.

Therefore, because the federal circuits universal application of the Chapman standard to Doyle violations is consistent with the prior decisions of this Court, the writ should be denied.

CONCLUSION

For the foregoing reasons, respondent Charles Miller respectfully requests this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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ORIGINAL

No. 85-958

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

LARRY W. EYLER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent, LARRY W. EYLER, by his Attorney, DAVID P. SCHIPPERS, JR., and respectfully asks leave, pursuant to Rule 46(1) of the Rules of this Court, to file the attached Response to Petition For A Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District without prepayment of costs, and to proceed in forma pauperis.

Leave to proceed in forma pauperis was not sought at the trial or appellate levels. An Affidavit in accordance with Rule 46 of the Rules of this Court is attached hereto.

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